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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

70-5026

No. ~~5944~~

CLAUDE ALEXANDER,

*Petitioner,*

v.

STATE OF LOUISIANA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF LOUISIANA

## BRIEF FOR PETITIONER

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Washington, D. C. · THIEL PRESS · 202 · 393-0625

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## BRIEF FOR PETITIONER

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### OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported at 255 La. 941, 233 So.2d 891, and is set out in the Appendix (A. 170-180).[1]

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[1] In a companion case, *State of Louisiana v. Pratt*, 255 La. 919, 233 So.2d 883 (1970), the Supreme Court of Louisiana decided issues relating to jury discrimination common to both cases. The relevant parts of the *Pratt* decision have been set out in the Appendix to this Brief (B. A. 9a-15a).

## JURISDICTION

Judgment of the Supreme Court of Louisiana was entered on March 30, 1970 and a motion for rehearing was denied May 4, 1970 (A. 181). An extension of time for filing a petition for writ of certiorari was granted by Mr. Justice Black to and including September 29, 1970. The petition for writ of certiorari and a motion for leave to proceed in forma pauperis were filed on September 29, 1970, and were granted on March 1, 1971 (A. 181).

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here the deprivation of rights, privileges and immunities secured by the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

This case also involves sections 401-404, 408, 410-411, 413-417, and 419 of the Louisiana Code of Criminal Procedure, the texts of which are set out in the Appendix to this brief (B.A. 1a-9a).

## QUESTIONS PRESENTED

1. Was petitioner, who is a Negro, denied due process and equal protection of the laws as guaranteed by the Fourteenth Amendment by being indicted by a grand jury chosen from a venire from which Negro citizens were systematically excluded in violation of *Whitus v. Georgia*, 385 U.S. 545?

2. Was petitioner denied due process of law as guaranteed by the Fourteenth Amendment by being indicted by a grand jury chosen from a venire from which women had been systematically excluded?

3. Was petitioner denied due process of law as guaranteed by the Fourteenth Amendment where at trial a statement

was introduced, for impeachment purposes, that he allegedly had given to police officers shortly after his arrest and where the testimony of the police officer established that petitioner was not advised that he had the right to have a lawyer present at the time he gave any statement and that petitioner had not affirmatively waived his right to remain silent?

## STATEMENT OF THE CASE

Petitioner, Claude Alexander, is under a sentence of life imprisonment imposed by the District Court for the Fifteenth Judicial District in Lafayette Parish, Louisiana, following his conviction for rape. His conviction was affirmed on appeal by the Supreme Court of Louisiana (A. 170).

Prior to trial petitioner filed motions to quash the indictment on the grounds that: (1) citizens of the female sex were systematically excluded from the grand jury list and venire and from the grand jury empaneled; and (2) citizens of the Negro race were included in the grand jury list, and grand jury venire, in such small numbers as to constitute only a token representation having no relationship to the number of Negroes in the general population in the Parish of Lafayette and in the Fifteenth Judicial District. Therefore, the indictment against him was invalid and illegal because it was returned by a grand jury empaneled from a grand jury venire made up contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States of America (A. 6).

## 1. Facts Relating to Racial Discrimination in the Composition of the Jury.

Prior to trial a hearing was held on petitioner's motion to quash the indictment.[2] The evidence revealed that the jury commission was appointed by the court and consisted of five members (all of whom were white (A. 50)), including the clerk of the court of Lafayette Parish. The commission had selected a list of 400 prospective jurors to serve for the terms in which petitioner was indicted. Of these 400 prospective jurors 27 were Negroes, or 6.75%, and the race of 5 persons was unknown.[3] From this list 20 names were drawn, one of which was that of a Negro. From these 20, twelve, none of whom were Negro, comprised the actual grand jury that indicted petitioner (A. 3-4, 16-24, 39).[4] Petitioner's challenge to the grand jury centers on the manner in which the commissioners selected the 400 prospective jurors from which his grand jury was drawn.

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[2] A. 29-65. The hearing was held jointly in the cases of petitioner and his co-defendant, Lee Perry Pratt. The Supreme Court of Louisiana decided the jury discrimination issues in Pratt's appeal. The relevant portions of that decision, *State of Louisiana v. Pratt*, 255 La. 919, 233 So.2d 883 (1970), are set out in the Appendix to this Brief.

[3] It should be noted that there are inconsistencies in the record as to the number of Blacks and of persons whose race is unknown out of the total of 400 persons. The State introduced as an exhibit a certification by the clerk of the court stating that there were 25 Negroes (or 6.25%) and 4 persons with no race shown (A. 15). A count of the actual list of jurors, however, (A. 16-24) shows 27 Negroes and 5 persons with no race. In this brief, however, the 27-5 figures will be relied on as establishing a prima facie case of racial discrimination.

[4] These figures were obtained from the testimony of the registrar of voters (A. 39) and by comparing the lists of the grand jury venire and the actual grand jury (A. 3-4) with the overall jury list (A. 16-24).

According to United States Census reports for 1960 (which were admitted into evidence below), the total number of persons in Lafayette Parish over 21 years of age and hence eligible for service on juries was 44,986. Thirty-five thousand, five hundred and thirteen were white and 9,473, or 21.06%, were black. Of these totals, the male population, the only group considered for jury service (see part 2, *infra*), consisted of 21,736 persons. Of this number, 17,331 were white and 4,405, or 20.27%, were Black.

The evidence as to the method used by the jury commissioners in compiling the grand jury lists was as follows: A list of names was obtained from several different sources, including the Lafayette City telephone directory, the city directory, the registrar of voters registration list, lists submitted by the parish school board or any list the commissioners could find, including recommendations made by the jury commissioners themselves (A. 35, 37). A questionnaire was mailed out to persons on the list to determine whether or not the individual was qualified to be considered as a candidate for the general venire list (A. 40-41).

As a result of this process, the commissioners obtained 7,374 questionnaires, 1,015 of which, or 13.76%, were from Negroes (A. 15).[5] On each questionnaire there was given the race of the individual involved (A. 8, 51). A card was then made up on each person for whom there was a questionnaire and was attached to the questionnaire (A. 36). Each card also designated the race of the prospective juror (see A. 7, 51). Finally, a white slip of paper containing only the name and address of the person was attached to the questionnaire and the card (A. 55-58).

At this point, the commissioners were ready to select four hundred[6] names to place in the box from which to

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[5]One hundred and eighty-nine questionnaires had no racial designation (A. 15).

[6]Article 408, La. Code of Criminal Procedure, requires that at least three hundred names be drawn. The clerk testified, however, that four hundred were drawn in this case (A. 44).

draw grand jury venires of twenty names each. For each person they had a set of papers consisting of a questionnaire, a card and a slip of paper. On the first two, the race of the person was designated. The clerk testified that the commission worked from about 2000 of the sets which were placed on a table.[7] Sets were picked up, purportedly at random; the white slip of paper was removed and put into the box (A. 43, 48, 55-58).

At the end of this procedure the jury commission had selected four hundred names, 27 of which, or only 6.75%, were those of Blacks. For the purpose of selecting the grand jury that indicted petitioner twenty slips of paper were pulled from the box, one of which was that of a Negro (*i.e.*, 5% of the names were Negro). The lone Negro was not drawn to serve on the twelve-man grand jury. Thus, the grand jury that actually indicted petitioner included no Negroes at all. The clerk testified that no consideration was given to race during the selection procedure (A. 34, 35, 41, 45, 47-48, 54-57, 59). However, it was admitted that the documents used to select the venire contained racial designations, that the designation was referred to on occasion for identification purposes, and that the commissioners could have noticed the race of the persons during the selection process (A. 48, 51-52, 58-59).

### 2. The Facts Relating to the Exclusion of Women from the Jury Rolls.

The evidence established that women were totally excluded from juries in Lafayette Parish because of the operation of Article 402, La. Code of Criminal Procedure, which prohibits the selection of a woman unless she has filed a written declaration of her desire to serve (A. 32-33).

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[7] After the questionnaires and cards were made up, they were reviewed and persons not qualified or exempted under the law were excluded (A. 52, 54-55).

The clerk of the jury commission testified that questionnaires were deliberately not sent to women (A. 35-36). Only preliminary efforts had been made to encourage women to declare their desire to serve.[8]

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[8]The clerk of court (who is also a member of the jury commission) testified as follows:

Q. Did you act as a member of jury commission in drawing up a grand jury venire which made its return in the first week or two of September of this year?

A. Yes, sir.

Q. That would be the same grand jury that returned an indictment against Claude Alexander, do you know that, sir?

A. Yes, sir.

Q. Yes, Mr. LeBlanc, are you familiar with the procedures followed by the Jury Commission in drawing up the venire of three hundred names for the grand jury?

A. Yes, sir.

Q. And you participated in that procedure?

A. Yes, sir.

Q. In drawing up the list of three hundred names, were any citizens of the female sex included?

A. No.

Q. In fact, all women were excluded, isn't that right?

A. We didn't have any names submitted to us of any with the intention of willing to serve.

Q. And you didn't look for any names of women to serve on the jury, the grand jury?

A. That's right.

Q. And none were listed on the grand jury venire.

A. That right. (A. 32)

* * * * *

Q. Mr. LeBlanc, you would include the names of any women who volunteered service. Is that correct?

A. Yes.

Q. And as I understand, the reason you did not include women is because they are exempt from service unless they specifically volunteer and offer their service. Is that right?

A. Yes (A. 53).

* * * * *

According to the United States Census Report for 1960, the total number of women in Lafayette Parish over 21 years of age and hence eligible for service on juries over 23,250, with 5,068, 21.8%, being Black. By excluding women, therefore, more than 50% of the persons eligible to serve were automatically kept off juries. The jury list, the grand jury venire and the grand jury that indicted petitioner contained no women at all.

### 3. The Facts Relating to the Admissibility of Petitioner's Confession.

At the trial the prosecutrix and her boyfriend identified petitioner as one of the men who had committed the assault and rape. Policemen who came upon the scene similarly identified him as the person they had apprehended as he tried to flee. Petitioner took the stand and testified in his own defense. His story was that he had been in the park on his way to burglarize a club on the premises. As he was walking along, at about 1:30 A.M., he heard moans. He investigated and saw a white girl, nearly nude, at the bottom of a culvert. He went into the culvert, looked at the girl and started back out to go get help. At this instant, a light was shone in his face and he was arrested by police officers.

When petitioner had finished his direct testimony, the prosecutor announced that he would introduce a statement

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Q. Were any invitations or notices sent to women advising that they had a right to declare their desire to serve on the jury?

A. I've discussed that with the Assistant District Attorney and I've sent her at different women's clubs to explain to the women the possibility of being on the jury. The reason so far that the women have not served is because facilities and accommodations for ladies were not available in the old courthouse. But since the new place is being constructed we're working on the women to submit names and intention to serve (A. 54).

allegedly given to police officers immediately after petitioner's arrest. The jury was excused, and a hearing was held before the judge to determine the admissibility of the alleged confession (A. 65-67). The testimony of the officers was that one of them advised petitioner that he had the right to remain silent, that anything he said could be used against him in court, that he was entitled to an attorney, that if he couldn't afford an attorney one would be offered to him, and also that he had the right to stop talking at anytime he felt like it (A. 70, 74, 85, 100-101). In response to a question by petitioner's counsel, however, the officer testified positively that petitioner had *not* been informed that an attorney would be appointed to be present at the time he gave a statement (A. 157-158).[9] Further, two of the officers testified positively that petitioner made no response to the warning given him. Rather, the interrogating officer testified that he just began asking questions and petitioner responded to them (A. 78-79, 90, 92).[10]

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[9] Q. Captain, you did tell this man, did you, that he had a right to be advised by an attorney?

A. I advised him that he had a right to a lawyer.

Q. And that he had a right to have an attorney present when the statement was taken?

A. No, sir.

Q. You didn't tell him that?

A. No, sir (A. 157-158).

[10] Thus:

Q. Capt. Picard, you said that you told him something about his right to remain silent?

A. Yes, sir.

Q. And did he remain quiet and gave you no answer when you told him that?

A. Not during that saying, no, sir.

* * * * *

A. After I advised him of his rights I said, "What happened in the park?", and he told me.

* * * * *

Q. But he didn't tell you that yes, he would agree to talk, did he?

The questioning took place in the detective's office at the city police station at 2:30 A.M., immediately after petitioner's arrest (A. 67-68). The petitioner and three police officers were the only persons present. One officer asked questions, took notes of petitioner's answers (A. 93), and then reduced the alleged oral statement to writing (A. 68). The notes were then discarded (A. 95).

Petitioner testified that at the time of his arrest he had been handled roughly by the officers (A. 110-111). He further testified that he was refused the use of a telephone to call his mother at the time of the interrogation (A. 111-112), and that he told the interrogating officers that he was sleepy (A. 112-114). These allegations were denied by the officers.

All the witnesses testified that petitioner refused to sign the statement when the interrogating officer read it to him. The officers testified that the reason he gave was that he wouldn't sign it until he got his shoes back (A. 71, 73, 88). Petitioner testified, however, that it was because he hadn't said the things that were in the statement (A. 116, 117-119). In any event, the only signature on the statement from which the interrogating officer testified was that of the officer (A. 152).

The trial judge overruled petitioner's objections to the introduction of the purported confession, holding that it had been made voluntarily and that the proper *Miranda* warnings had been given (A. 123-126). The jury was re-

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A. No, he just started talking.

* * * * *

Q. He just kept silent. Is that right, sir?

A. He kept silent until he told me what happened in the park.

* * * * *

Q. He said nothing to show you the state of his mind in response to your warnings until he began to say what occurred in the park, isn't that right, sir?

A. No, sir. (A. 78-79; see also A. 158.)

called and the interrogating officer was permitted to testify as to the statement. It was an admission of the crime and directly contradicted the story petitioner had given on the witness stand.[11]

### 4. Proceedings in the Courts Below.

As stated above, petitioner raised his constitutional objections to the jury selection procedures by motion prior to trial and objected at trial to the introduction of his alleged confession. As to the jury claims the trial court denied the motion to quash, relying on Louisiana and federal court decisions dealing with racial exclusion and on this Court's decision in *Hoyt v. Florida*, 368 U.S. 57, dealing with the exclusion of women from juries (A. 26). With regard to the introduction of the confession, the court held: (1) the confession was voluntary; and (2) there had been compliance with *Miranda v. Arizona*, 384 U.S. 436.

On appeal, the Supreme Court of Louisiana, in the companion case of *State v. Pratt*, 255 La. 919, 233 So.2d 883 (1970) (B.A. 9a) rejected both challenges to the grand jury venire (A. 172-174). The court held that purposeful exclusion of Negroes had not been shown, and also relied on *Hoyt v. Florida* to uphold the exclusion of women. With regard to the confession issue, the Supreme Court accepted the factual determination of the trial judge (A. 179). A rehearing was denied (A. 181), and a writ of certiorari was sought here.

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[11]Petitioner also testified that the morning after his arrest he had given another statement to a detective that was substantially the same as the testimony he gave at the trial (A. 137-138).

## SUMMARY OF ARGUMENT

### I

Petitioner made out a *prima facie* case of racial discrimination in the selection of the venire from which the grand jury that indicted him was chosen. Although adult Negro males compose 20.27% of the population of Lafayette Parish, they represented only 6.75% of the jury venire of four hundred persons. The jury commissioners claimed that the four hundred persons were selected at random from a pool that was 13.76% black. However, statistical analysis demonstrates that it was improbable in the extreme that the reduction in the percentage of blacks could have resulted from random selection methods.

No explanation was given for these disparities, except for denials that race was considered when the venire was selected. However, at critical stages in the selection process the jury commission had a clear opportunity to discriminate, since the documents they worked with designated the race of the persons being considered for jury duty. Therefore, the grand jury was empaneled in violation of the equal protection clause of the Fourteenth Amendment.

### II

By operation of a Louisiana statute that excludes all women from jury duty unless they volunteer for service, no women whatsoever were on the jury rolls. This result largely was caused by the jury commission's deliberately not sending jury questionnaires to women during the process by which they developed a pool of names to be considered for service. Thus, this case is distinguishable from *Hoyt v. Florida*, 368 U.S. 57 (1961), relied on by courts below, since the affirmative action of the commission was responsible for the total absence of women from the rolls. In contrast, there were at least some women on the rolls in *Hoyt*.

The total exclusion of women from jury service denied petitioner his right to a jury venire reasonably representative of a cross-section of the community as a whole. Louisiana has offered no valid justification for the use of a scheme that has had the totally exclusionary effect shown here. Therefore, the indictment of petitioner violated his right to due process of law guaranteed by the Fourteenth Amendment.

III

At petitioner's trial, an alleged confession was introduced by the state for impeachment purposes that was obtained without compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966). This case is distinguishable from *Harris v. New York*, 401 U.S. ___, 28 L.Ed.2d 1 (1971), in that the circumstances surrounding the giving of the confession raise serious doubt as to its reliability. *Harris* should be limited to those cases where the confession involved is of the same order of reliability as physical evidence that has been seized in violation of the Fourth Amendment. Therefore, petitioner was denied his right to due process by the introduction of the confession against him.

## ARGUMENT

### I

### PETITIONER WAS DENIED EQUAL PROTECTION OF THE LAW IN THAT NEGROES WERE SYSTEMATICALLY EXCLUDED FROM THE GRAND JURY THAT INDICTED HIM.

At the time of the indictment of petitioner the grand jury list and venire for Lafayette Parish, Louisiana was made up from various lists secured by the jury commissioners (A. 35-36).[12] A questionnaire was mailed out to

[12] In this case, only the grand jury was challenged. Thus, this case is like, *e.g.*, *Eubanks v. Louisiana*, 356 U.S. 584 (1958).

every eighth person on the list thus compiled by the jury commission (A. 40-41).[13] The race of the individual was listed on the questionnaire (A. 8). When the questionnaires were returned, the commissioners determined which persons were qualified for jury service. For each such person a card was made out which also designated race (A. 7) and the card was attached to the questionnaire. Slips of paper on which were written only the name and address of the individual were then attached to the questionnaire and card. Sets of questionnaires, cards and slips were picked until 400 names were chosen. The slips of paper alone were then deposited in the general venire box from which jury venires were drawn.

At the beginning of this process the jury commission had started with an eligible male population that was 20.27% black. They received back 7,374 questionnaires, 1,015 of which, or 13.76%, were from Negroes.[14] From these questionnaires they picked a jury venire of 400 names, 27 of which, or only 6.75% were black,[15] and finished with a 20-man venire containing only one black. The twelve men on the grand jury that actually indicted petitioner were all white.

### A. Petitioner Made Out a Prima Facie Showing of Racial Discrimination in the Selection of the Grand Jury that Indicted Him.

This Court has long held that where statistically significant disparities between the percentage of Negroes eligible to serve on juries and the percentage on jury rolls has been shown, a prima facie case of racial discrimination has been made. *Turner v. Fouche*, 396 U.S. 346, 359 (1970); *Sims*

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[13]If the eighth person was exempt by law from jury service, however, then the next eligible individual was selected (A. 35-36).

[14]One Hundred and Eighty Nine had no racial designation (A. 15).

[15]Five of the 400 were unidentifiable as to race.

*v. Georgia*, 389 U.S. 404 (1967); *Jones v. Georgia*, 389 U.S. 24 (1967); *Whitus v. Georgia*, 385 U.S. 545 (1967); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Norris v. Alabama*, 294 U.S. 587 (1935). Once such a showing has been made, the state has a heavy burden of rebuttal, which may *not* be satisfied by testimony, as here (A. 34; 35; 41; 45; 47-48; 54-57; 59), of jury officials that they did not include or exclude any one because of race. See, *Turner v. Fouche*, 396 U.S. at 361, and cases cited there at n. 21.

Petitioner here made such a showing. Lafayette Parish has a population of 20.27% black males. Only 13.76% of the names of persons obtained by the commission by use of questionnaires were black. The actual jury list compiled from these questionnaires and from which the grand jury was drawn contained only 6.75% black names. And even if the five persons whose race was not known are assumed to have been Negro, the percentage was still only 8%.

The state has simply failed to provide any adequate reason for these results. With regard to the disparity between the percentage of blacks in the parish and the percentage of blacks among those returning questionnaires, the clerk of the commission testified that he was aware of the fact that there had been a lower rate of response from Negroes. Indeed, he admitted that because of the sources of names that were used, "naturally there was a greater percentage of personal mail to the white people than to the Negroes. And for that reason it follows that we had larger replies from the white than from the colored" (A. 45-46). Thus, it was clearly established that the commission had failed in its constitutional duty to utilize methods that would result in a jury list "... 'truly representative of the community,' " as required by *Carter v. Greene County*, 396 U.S. 320, 330 (1970), and by *Turner*.

Even more serious, and as equally lacking in a constitutionally acceptable explanation, is the large drop from 13.76% blacks returning questionnaires and 6.75% blacks on the actual jury list. The clerk testified that the more

than 7,000 returned questionnaires were examined to determine who among the returnees were eligible for service until about 2000 were left (A. 52; 54-55). No evidence was offered by the state as to the racial breakdown of those excluded, so it is not known whether the remaining questionnaires reflected the same 86.24% white–13.76% black ratio as did the total number of questionnaires. It is clear from *Turner*, however, that the burden was on the state to justify and explain any drop in the percentage of blacks resulting from this weeding out process, if any in fact did take place. 396 U.S. at 359-361.

The two thousand or so questionnaires that were left were then placed on a table, and 400 were picked. Of these, only 27 were blacks, and for five the race was not known. The selection procedure was purportedly a random one (A. 55-58). Petitioner urges, however, that by the use of accepted methods of statistical analysis it can be shown that the chances of this result being obtained by a random system are so small as to lead irresistibly to the conclusion that random methods were not used in fact.[16]

The approach to be used is that described at length in Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338 (1966), referred to by Mr. Justice Clark, writing for the Court in *Whitus v. Georgia*, 385 U.S. 545, 552, note 2. In that article, Finkelstein suggests an approach to jury discrimination cases more exact than simply attempting to infer discrimination from what appear to be significant disparities between percentages of Negroes in the general population and in jury lists, the intuitive approach typically used. He points out that statistical analysis provides a ready tool by which courts can determine the probability

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[16]The argument that follows is based on the assumption that the proportion of blacks in the 2000 questionnaires used for selection was the same as that in the 7,434 received, *i.e.*, 13.76%. As noted above, if the percentage was significantly less than that, the state failed in its burden to explain any disparity.

of particular numbers of blacks being on lists if a random method of jury selection was indeed used. If the probability in a particular case is significantly small, then it can be concluded that the selection process was not random. Thus, in the absence of an alternative explanation of why the number of Negroes is small, it can be inferred that race was a factor in choosing the jury. In his conclusion, Finlestein points out:

> A basic legal principle in the jury discrimination cases is that the selection of an improbably small number of Negroes is evidence of discrimination . . . The second legal principle controlling these cases is that a disparity between the proportion of Negroes on venires and in the population generally is evidence of the improbability of random selection. 80 Harv. L. Rev. at 374.

In his article Finkelstein demonstrates how a number of methods can be used to calculate these probabilities. Here, we will use a simplified version of the chi-square method he describes at 80 Harv. L. Rev. at 365-373. The method and formula used are explained in *Moroney, Facts from Figures,* a book explaining statistical method and written for laymen without mathematical training.[17] This method, it should be noted, is a conservative one—that is, it approximates the highest possible probability of the particular result coming about by chance. As will be noted, the actual probability is much lower.

Turning to the facts in the present case, the first step in the calculation is to ascertain the number of blacks that would have appeared on the final jury list of 400 people if the proportion was the same as for the questionnaires. Since this was 13.76%, there would have been 55.04 blacks rather than only 27. What, then, is the probability that 27 or

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[17] 3rd and Revised Edition, Baltimore, Md., 1965 (Penguin Books-Pelican), Ch. 15, pp. 246-270. The formula can be found on page 250. A copy of this book has been deposited with the Clerk for the convenience of the Court.

fewer Negroes would appear on the list if the selection were random as claimed by the jury clerk? The chi-square formula, explained in detail in the margin below,[18] shows

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[18]The steps in the computation were as follows:

1. The formula used was:

$$\text{chi-square} = \frac{(A_w - E_w)^2}{E_w} + \frac{(A_n - E_n)^2}{E_n}$$

2. The arithmetic values were as follows:

| | Actual (A) | Expected (E) |
|---|---|---|
| White (w) | 373 ($A_w$) | 344.96 ($E_w$) |
| Negro (n) | 27 ($A_n$) | 55.04 ($E_n$) |
| Total | 400 | 400.00 |

(As noted above, the "expected" figures given above merely reflect the relative percentages of Negroes and whites among the questionnaires, *i.e.*, total jurors times percentage of Negroes among questionnaires equals expected Negro jurors, or 400 x 13.76% = 55.04.)

3. Applying the formula, thus:

$$\text{chi-square} = \frac{(373 - 344.96)^2}{344.96} + \frac{(27 - 55.04)^2}{55.04}$$

$$= \frac{(28.04)^2}{344.96} + \frac{(-28.04)^2}{55.04}$$

$$= \frac{786.24}{344.96} + \frac{786.24}{55.04}$$

$$= 2.279 + 14.285$$

$$\text{chi-square} = 16.564$$

4. To translate the chi-square numbers to determine probability we used the table published in the National Bureau of Standards Handbook of Mathematical Functions (National Bureau of Standards, Applied Mathematics Series, No. 55, June 1964, Govt. Printing Office, p. 982.) For a chi-square number of 16.564, the probability is five in 100,000, or .00005.

that that probability is at best only .00005, or five in 100,000.[19] Stated another way, the probability is that this result would obtain only once in 20,000 random selections.[20]

Thus, it has been established that, because of the number of Negroes selected, the probability that the four hundred names were selected at random, as claimed by the state, is so low as to render that claim inherently suspect. The disparity shown, as the Court said in *Whitus*, "strongly points" to the conclusion that race was considered by the jury commissioners. 385 U.S. at 551. As will now be shown, the commissioners had a clear opportunity to utilize racial considerations.

### B. The Evidence Established That There Was an "Opportunity for Discrimination" in Violation of Whitus v. Georgia and Avery v. Georgia.

In *Whitus v. Georgia*, 385 U.S. 545 (1967), and *Avery v. Georgia*, 345 U.S. 559 (1953), this Court dealt with a combination of a disparity between blacks eligible for jury duty and blacks on the jury rolls and of what it termed an "opportunity for discrimination" by those involved in the jury selection process. 385 U.S. at 552. In *Avery*, different colored tickets were used for white and Negro prospective

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[19]Dr. John de Cani, a professor of statistics at the University of Pennsylvania has calculated the exact probability as being only .0000043, or less than 5 in one million. Thus, it may be noted, is less than the probability noted by Mr. Justice Clark in *Whitus*, which was .000006, or six in one million. 385 U.S. at 552, no. 2.

[20]Even if it is assumed that all five of the persons whose race was unknown were black, the probability is only three in ten thousand. (.0003). The relevant figures under this assumption are Aw=368, An=32, Ew=344.96, En=55.04, chi-square=11.184. And if the five unknowns are excluded altogether, the probability is five in one hundred thousand. (.00005). (Aw=368, An=27, Ew=340.65, En=54.35, total jurors=395, chi-square=15.959.)

jurors. In *Whitus*, names of prospective jurors were selected from tax digests segregated according to race. See also *Bostick v. South Carolina*, 386 U.S. 479 (1968); *Jones v. Georgia*, 389 U.S. 24 (1967); *Sims v. Georgia*, 389 U.S. 404, 407-08 (1967); *Anderson v. Georgia*, 390 U.S. 206 (1968). In both instances, convictions were reversed because of the danger of abuse inherent in a system where the race of jurors could be known at critical stages in the jury selection process.

This case presents facts indistinguishable from *Whitus* and *Avery*. A significant statistical disparity has been shown above, and an opportunity to discriminate was present at at least two stages in the process. As has already been noted, race was requested on the questionnaires sent out to all prospective jurors; the inquiry was answered in all but 189 of 7,374 of the returned questionnaires (A. 15). A card was filled out for each juror which also contained a racial designation. The questionnaire and card were attached together and were used in the process by which the possible percentage of Negroes to be included in the jury rolls was reduced from 13.76% to 6.75%.

Thus, the questionnaires were used to reduce the number of possible jurors from 7,374 to about 2000. The questionnaires and cards were also used to select from that 2000 the 400 names that would be put into the venire box. The only justification given for the racial designation was that it was used, on occasion, for the purpose of identifying the individual who had sent back the questionnaire (A. 51). No explanation was given, however, as to why the race of the person had any relevance in determining his qualifications to serve. Moreover, it was admitted that the commissioners had the opportunity to look at the question-

naires and notice the race of the person in question (A. 58).[21]

Thus, this case presents precisely the situation that obtained in *Avery* and *Whitus*. There was a significant disparity between eligible Negroes and those ultimately placed on the jury rolls that was unexplained by the State except for general statements that the commissioners did not take race into account. There was a clear opportunity to discriminate because prospective jurors were identifiable as to race at critical stages in the selection process. Just as in *Whitus*, it cannot be said "on this record that [the opportunity to discriminate] was not resorted to by the commissioners." 385 U.S. at 552.

In summarizing petitioner's contentions concerning racial discrimination in the selection of the grand jury venire, we wish to re-emphasize the cumulative effect of the jury selection process detailed above. The commissioners began with an adult male population that was 20.27% black. If the final venire of four hundred persons had reflected this proportion, it would have contained 81 Negroes and 319 whites instead of the actual 27 Negroes and 373 whites. However, the commission developed a basic pool that was only 13.76% black (6359 whites, 1015 Negroes) by the use of methods that they knew were likely to elicit a smaller proportion of black than white responses. Even so, a 13.76% figure for the venire would produce 55 black persons and 345 whites. The wide divergence from these figures indicates, as shown above, that a random method of selection was not used.

At two crucial steps in the process, when the questionnaires were reduced to two thousand and when the final selection of the four hundred names was made, there was

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[21] Significantly, the clerk agreed that the proof of whether race was considered would be "how many colored or how many white are actually included in the four hundred selected from the two thousand" (A. 58).

the clear opportunity to discriminate condemned by this Court, because racial designations appeared on the forms used by the commission. The net result was that only 27 Negroes were on the grand jury venire of 400 persons. When 20 names were drawn in order to constitute the actual grand jury that indicted petitioner, only one person was black and he was not picked to serve on the twelve-man jury. Thus, by a consistent process of progressive and disproportionate reduction of the number of blacks, the ultimate result was reached—an all-white grand jury that returned the indictment challenged here. Because of racial discrimination in the selection of the grand jury, the indictment must be quashed and the conviction based on it vacated, *Hill v. Texas*, 316 U.S. 400 (1942).

## II

**THE TOTAL EXCLUSION OF WOMEN FROM JURIES IN LAFAYETTE PARISH DEPRIVED THE PETITIONER OF A JURY REPRESENTING A CROSS-SECTION OF THE COMMUNITY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.**

It is clear in this case that there were no women on the jury rolls in Lafayette Parish. The clerk of the jury commission testified that this was because of the effect of Article 402, La. Code of Criminal Procedure, on the manner in which the commission proceeded to obtain names of prospective jurors. That section expressly excludes all women except for those who had previously filed a declaration stating their desire to serve.

The clerk testified that in selecting names of persons to whom questionnaires were to be sent, the names of women were deliberately passed over. Moreover, only preliminary efforts had been made to encourage women to volunteer to serve.

According to the United States Census Report for 1960, the total number of women in Lafayette Parish over 21

years of age, and hence otherwise eligible for service on juries, was 23,250, with 5,068 being black. Since the total population of the Parish over 21 was 44,986, therefore, 51.7% of the persons eligible to serve were automatically kept off juries by the exclusion of women.

Both the trial court and the Supreme Court of Louisiana relied on the decision of this Court in *Hoyt v. Florida*, 368 U.S. 57 (1961), in upholding this result, the latter saying that "[i]t is well settled that the fact that women do no appear on a general venire list for jury duty furnishes no cause for quashing an indictment in view of Article 402 of the Code of Criminal Procedure." (A. 173.)

Petitioner contends that the Louisiana Supreme Court's reliance on *Hoyt* was misplaced, since his case raises the issue left open by *Hoyt*, viz., whether the total exclusion of women from juries violates the due process clause of the Fourteenth Amendment. Petitioner urges that *Hoyt* should not be extended to approve such total exclusion.

### A. This Case, Unlike Hoyt, Involves the Total Exclusion of Women from Juries.

In *Hoyt*, this Court sustained a Florida statute[22] essentially the same as Article 402 against attacks on its constitutionality both on its face and as applied. It is with regard to the latter aspect of *Hoyt* that petitioner contends that the present case presents facts sufficiently different to require a different result.

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[22] Fla. Stat. Ann. § 40.01(1): ". . . provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list." As will be discussed below, in 1967 this section was amended to remove this provision and substitute an exemption limited to "expectant mothers and mothers with children under eighteen (18) years of age, upon their request . . ." Laws 1967, C. 67-154, § 1.

In *Hoyt*, the Court pointed out that it found "no substantial evidence whatever in this record that Florida has arbitrarily undertaken to exclude women from jury service" (386 U.S. at 69). Similarly the Chief Justice and Justices Black and Douglas concurred in the result since they could not say "from this record that Florida is not making a good faith effort to have women perform jury duty without discrimination on the ground of sex." (*Ibid.*) These conclusions were supported by the facts that there were women on the jury rolls in the county, and that efforts had been made to include all eligible women on the rolls. Thus, it could not be concluded that the jury commissioners had acted in any way to purposefully exclude women discriminatorily (368 U.S. at 68).

The record in this case presents a far different picture when the jury selection procedures utilized are examined. The jury commissioners used a variety of sources to obtain names of persons to whom preliminary questionnaires would be mailed. These questionnaires were not for the purpose of actually summoning persons to jury duty, but only to determine eligibility. Despite this, women were deliberately passed over as persons to whom questionnaires would be sent.[23] Moreover, only preliminary attempts had been made to encourage women to declare their desire to serve on juries (A. 54). The result of these practices was that there were no women whatsoever on the jury lists. No explanation was given as to why it would not have been possible to send questionnaires encouraging women to volunteer to serve and thereby to obtain at least some representation on the jury rolls.

Thus, unlike *Hoyt*, the record in this case demonstrates that the jury selection procedures deliberately avoided placing women on juries. The affirmative actions of the

[23] Questionnaires were sent to every eighth person on the registrar of voter's list. However, if that person "was a doctor or *if it was a lady* or if it was a school bus driver" the name was passed over and no questionnaire was sent (A. 35-36).

commissioners were an important factor in there being no women on the jury lists at all.

### B. The Total Exclusion of Women Violates the Requirement of Representative Juries Imposed by the Due Process Clause.[24]

In *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970), this Court defined "the very idea of a jury" as being "'a body truly representative of the community.'" (396 U.S. at 330.) Thus, the Court established firmly what it had earlier suggested in *Smith v. Texas*, 311 U.S. 128 (1940), that the exclusion from jury service to any large, identifiable, and significant group in the community violates the requirements of due process. See *Labat v. Bennett*, 365 F.2d 698, 719-24 (5th Cir. 1966.)[25]

It is clear that the practice approved by the courts of Louisiana in the case violated this fundamental requirement. First, as shown above, more than 50% of adults were automatically and totally kept off the jury rolls. Second, the persons were excluded solely because they belonged to a particular group, women. Third, it is clear that women are a significant, identifiable group of the community within the meaning of the cases cited above.

This Court specifically so held in a case involving the administration of the federal jury selection statutes, *Ballard v. United States*, 329 U.S. 187 (1946).

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[24]Since petitioner is male, his challenge arises under his due process right to a jury venire from which *no* class has been arbitrarily excluded. See *Labat v. Bennett*, 365 F.2d 698, 723-24 (5th Cir. 1966).

[25]In *Labat*, the Fifth Circuit, in dealing with the total exclusion of wage earners as a class from Louisiana juries, read into the constitutional requirement of representative jury rolls this Court's holdings in *Glasser v. United States*, 315 U.S. 60 (1941), and *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946), which dealt with interpretations of federal jury statutes.

> It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury *less representative of the community than would be true if an economic or racial group were excluded.* (329 U.S. at 193-94) (Emphasis added; footnotes omitted.)

Hence, it was concluded, the exclusion of women denied the right to a jury selection procedure that would result in rolls being representative of the community as a whole. *Ballard*, of course, involved the administration of the federal jury selection statutes. Petitioner urges, however, that its reasoning compels the same result under the constitutional standard as enunciated in *Carter*. The right in both instances is to a jury list selected so as not to exclude a representative cross-section of the community; for the reasons set out in *Ballard* a selection process that excludes all women violates that fundamental right.

Thus, a three-judge federal district court struck down an Alabama statute which, by prescribing that one of the qualifications for jury service was that the person be a male cit-

izen,[26] totally excluded women for jury service (*White v. Crook*, 251 F.Supp 401 (M.D. Ala. 1966). The court said:

> The time must come when a state's complete exclusion of women from jury service is recognized as so arbitrary and unreasonable as to be unconstitutional. 251 F. Supp. at 409.

Therefore, the court held, the Alabama statute violated the Fourteenth Amendment.

This case, of course, like *Hoyt*, involves a statute which is not on its face an absolute prohibition on women serving on juries.[27] Petitioner urges, however, that on the factual showing made here the statute operates as such a prohibition, so that this case is in all essentials the same as *White v. Crook*.

The Louisiana statute singles out women and excludes them automatically unless they volunteer to serve by filing a declaration to that effect with the court. Presumably, the state will seek to justify a scheme which operates to exclude all women on the ground that it is not wholly irrational in light of assumptions concerning the general role of women in society. Petitioner contends, on the other hand, that once a denial of a constitutional right has been shown—here, to jury selection methods that result in jury lists representative of the community as a whole—the State must be put to a much stricter test of justifying what it has done. Thus, it must show that its legitimate goal—exempting women with family responsibilities who would suffer hardships if forced to serve on juries—cannot be

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[26] Title 30, § 21, Code of Alabama, Recompiled 1958.

[27] At the present time, no state has such an absolute prohibition. The three states that barred women totally at the time of the decision in *Hoyt* have since amended their statutes. Compare the statutes cites in *Hoyt*, 368 U.S. at 62, n. 5, with Ala. Code 1940, Tit. 30, §§ 21, 21.1, as amended 1966 Ex. Sess. p. 429, § 4, p. 427, § 1; Mississippi Code 1942 Ann. (1956), § 1762, as amended by laws, 1968, Ch. 335, § 1; and South Carolina Code 1962, § 38-52, as amended, 1967 (55) 895.

accomplished by more narrow means that will not result in fact in a denial of constitutional rights. In other words, a *compelling* need for Article 402 must be shown. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

It is submitted that such a showing simply cannot be made. Rather, Louisiana is now in the position, along with one other state, New Hampshire,[28] as having a jury selection scheme most likely to keep all women from serving on juries. As pointed out above, Alabama, Mississippi, and South Carolina no longer exclude women from jury service,[29] and Florida, the state involved in *Hoyt*, now calls women for jury service on the same basis as men and limits its special exemption to women who are pregnant or who have children under eighteen who affirmatively request exemptions.[30] Of the sixteen jurisdictions (excluding Louisiana and New Hampshire) noted by this Court in *Hoyt*[31] that allowed women an absolute exemption based on their sex *if requested*, five states have now placed women on essentially the same basis as men and allow exemptions only for specific occupations.[32]

Thus, the vast majority of states either treat women no different than men, or allow women to be excused from jury duty by focusing specifically on the question of whether family duties in the particular case require an exemption. Even those states which allow a blanket exemp-

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[28]N.H. Rev. Stat. Ann., 1955 § 500:1.

[29]See footnote 27, *supra*.

[30]Fla. Stat. Ann. § 40.01, as amended, Laws 1967, C. 67-154, § 1.

[31]368 U.S. at 62, n. 6.

[32]*Idaho* (Idaho Code § 2-411 has been repealed); *Minnesota* (Minn. Stat. Ann., § 593.02, as amended); *North Dakota* (North Dakota Cent. Code § 27-09-04, repealed by S.L. 1967, Ch. 251, § 1); *Virginia* (Va. Code § 8-178(30) amended, now exempts *housewives* rather than *women*); *Washington* (Wash. Rev. Code, § 2.36.080, amended to remove exemption of women *per se*).

tion based on sex call women for jury duty and put the burden on them to request the exemption. Such a scheme is at least far more likely to result in women being on jury rolls in some numbers in contrast to the operation of the Louisiana statute as shown here.

In sum, the Louisiana statutory scheme simply goes much further than necessary to achieve any legitimate goal of the state. It very well may be permissible to excuse women with family obligations from jury duty. But the statute does not focus with sufficient particularity on this restricted objective. Rather, it rests on the wholly unwarranted assumption that all women are bound to be so enmeshed in family obligations that they can be assumed not to be able to serve on juries. Recently, this Court has rejected such an assumption as a basis for denying employment to women because of the operation of the Civil Rights Act of 1964. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). Surely the Constitution's requirement that jury rolls be representative of the community as a whole compels the same result.[33] This is particularly true in light of the fact that virtually every other state has found it possible to achieve the legitimate state purpose of exempting those women who would actually suffer hardships because of family responsibilities without resorting to a statutory scheme whose result is to have no representation of women on jury rolls whatsoever.

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[33] As the Court in *White v. Crook* found and held:

> [T]he exclusion of women from jury service in Alabama by a statutory provision is arbitrary in view of modern political, social, and economic conditions . . . ." 251 F.Supp. at 409.

## III

## THE INTRODUCTION OF PETITIONER'S ALLEGED CONFESSION VIOLATED HIS RIGHTS TO DUE PROCESS OF LAW.

It is clear from the record that the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), were not complied with in two important respects before petitioner's statement was taken.[34] Unquestionably, an attempt to give a *Miranda* warning was made;[35] however, the interrogating officer failed to inform petitioner that he was entitled to have an attorney present at the time a statement was given. Indeed, he testified explicitly that he had *not* informed petitioner of that right.[36] In *Miranda*, however, this Court held that that specific warning was "an absolute prerequisite to interrogation." 384 U.S. at 471.

The second failure to comply with *Miranda* arose from the fact that there was no affirmative, intelligible waiver of the defendant's rights, and that such a waiver does not appear on the record. This Court specifically rejected the notion that waiver could be inferred by the silence of the accused, or by the fact that he responded to questioning after the warning was given:

> Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated. 384 U.S. at 475-76.

Here, however, the interrogating officer testified that after he gave petitioner a warning, petitioner simply began answer-

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[34]Petitioner was tried in 1968, after the effective date of *Miranda*.

[35]See, A. 70, 74, 85, 100-101.

[36]A. 157-158 (quoted *supra*, in footnote 9).

ing questions. There clearly was no affirmative waiver of his rights as required by *Miranda*.[37]

Hence, the conclusion is inescapable that the testimony of the officers themselves establishes a failure to comply with *Miranda*, and the conclusions of the courts below to the contrary rested on a misunderstanding of that decision. If, therefore, the confession had been introduced as part of the prosecution's case in chief, rather than for impeachment purposes, the conviction would have to be reversed.[38]

However, after the petition for writ of certiorari was filed in this case, this Court handed down its decision in *Harris v. New York*, 401 U.S. ____, 28 L.Ed.2d 1 (Feb. 24, 1971). *Harris* held that, even though a confession was taken in violation of *Miranda*, it could be used to impeach the testimony of a defendant. Petitioner urges that his case is distinguishable from *Harris*, and that that decision should be limited to circumstances where there is no question but that the confession to be introduced is fully reliable.

*Harris* relied on the decision in *Walder v. United States*, 347 U.S. 62 (1954). *Walder* involved the admissibility of physical evidence seized in violation of the Fourth Amendment to impeach testimony given by a defendant. Walder, who was being prosecuted for violation of the federal narcotics laws, testified that he had never sold or possessed any narcotics in his life. The government then put in evidence concerning a heroin capsule seized from Walder's home, including testimony of a chemist who had analyzed the capsule. As is the case in virtually all cases involving the admissibility of physical evidence, there was no question as to the reliability of the particular piece of evidence; as to that issue, the illegality of the search had no bearing.

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[37](A. 78-79; 90; 92; 158.) See footnote 10, *supra*, for the Officer's testimony.

[38]As will be discussed below, the impact of the confession was such so that its introduction could not said to be harmless error under the rule of *Chapman v. California*, 386 U.S. 18 (1967).

Confessions, on the other hand, present an entirely different question. *Miranda* is rooted in this Court's long experience in grappling with problems of the inescapable uncertainties that arise when it is claimed that a defendant has confessed in a police station, in the presence of officers only, and without aid of counsel or any other assistance. The circumstances of this case vividly illustrate the validity of that concern.

Petitioner, a black teenager, was placed alone in an interrogation room with three armed police officers at about 2:30 a.m. He was charged with a serious crime—the rape of a white woman. He was without counsel and had not contacted his parents. The interrogating officer failed to inform him fully of his constitutional rights, and the record shows that he did not waive those rights. There was no stenographer to take down his statement and no tape recording was made, even though court reporters and recording machines were available (A. 93-94). One officer asked questions and responses were given; the officer jotted down notes and then typed a statement.

When the officer read the statement to petitioner, he refused to sign it. The officers testified that he said he would not sign it because he didn't have his shoes; petitioner testified that he refused because the statement was not what he said. He contended that he did not commit the crime, while the statement was an admission of his participation in it. The next morning he gave a statement to a detective that, he claimed, substantially agreed with the version he gave at trial.

Thus, this case presents a classic example of the circumstances *Miranda* sought to avoid. Although it cannot be said that the statement was coerced, the atmosphere in which petitioner was placed, together with his adamant refusal to sign the alleged confession must give rise to serious doubt as to what in fact went on and what in fact was said by petitioner. The inherent and inescapable questions as to the reliability of the statement compel the con-

clusion that, in the absence of proper *Miranda* warnings, it was inadmissible for any purpose.

This result under these facts would not mean, of course, that confessions unaccompanied by proper *Miranda* warnings, would necessarily be unreliable. The use of a court reporter or the tape recording of a statement or the signing of a statement by a defendant would create the same kind of reliability that attaches to physical evidence such as was involved in *Walder* and other search and seizure cases. Absent such objective indicia of reliability, however, the concerns that prompted the decision in *Miranda* must prevail.

Finally, it is clear that the use of the alleged confession was not harmless error within the meaning of *Chapman v. California*, 386 U.S. 18 (1967). Petitioner gave in his defense a story that was consistent with his presence at the scene of the crime but which exculpated him. Whether the jury would have believed him without the confession being introduced is, of course, impossible to tell. But there can be no doubt that the introduction of a confession to the crime that directly contradicted his direct testimony could only have had a devastating impact against him that made it improbable in the extreme that the jury would accept his story.

## CONCLUSION

For the foregoing reasons, the indictment against petitioner should be dismissed and his conviction reversed.

Respectfully submitted,

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# APPENDIX

## 1. STATUTES OF LOUISIANA RELATING TO JURY SELECTION

Louisiana Code of Criminal Procedure, Vol. 1, pp. 317-391, articles 401-04, 408, 410-411, 413-417, 419. Note: In 1968, following the trial of petitioner, amendments were made to certain of these statutes. Following is the text of the statutes as of the time of petitioner's trial. The amended statutes are set out in a footnote to each of the altered sections.

Art. 401 – In order to qualify to serve as a juror, a person must:

(1) Be a citizen of the United States and of this state who has resided within the parish in which he is to serve as a juror for at least one year immediately preceding his jury service;

(2) Be at least twenty-one years of age;

(3) Be able to read, write, and speak the English language;

(4) Not be under interdiction, or incapable of serving as a juror because of a mental or physical infirmity; and

(5) Not be under indictment for a felony, nor have been convicted of a felony for which he has not been pardoned.

Art. 402 – A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

Art. 403 – The following persons are exempt from jury service, but the exemption is personal to them and is not a ground for challenge:

(1) The governor, lieutenant governor, state comptroller, state treasurer, secretary of state, superintendent of public education, their clerks and employees, the members, officers, and clerks of the legislature, and the judges and active officers of the several courts of this state;

(2) Any other public official, if jury service would seriously interfere with the performance of his official duties;

(3) Attorneys-at-law, peace officers, ministers of the gospel, physicians and dentists actively engaged in the practice of their professions, school teachers, school bus drivers, pharmacists, members of paid fire departments, chiefs and their first assistants of bona fide volunteer fire departments, and persons who are required to travel regularly and routinely in the course and scope of their employment;

(4) Persons who because of age, sickness, or other physincal infirmity would suffer serious detriment if required to serve as a juror; and

(5) Persons who have served as grand or petit jurors in criminal cases or as trial jurors in civil cases during a period of twelve months immediately preceding their selection for jury service. Amended by Acts 1968, No. 108. § 1.[1]

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[1] Art. 403 – The following persons are exempt from jury service, but the exemption is personal to them and is not a ground for challenge:

(1) The governor, lieutenant governor, state comptroller, state treasurer, secretary of state, superintendent of public education, their clerks and employees, the members, officers, and clerks of the legislature, and the judges and active officers of the several courts of this state;

(2) Any other public official, if jury service would seriously interfere with the performance of his official duties;

(3) Attorneys-at-law, peace officers, ministers of the gospel, physicians and dentists actively engaged in the practice of their professions, school teachers, school bus drivers, pharmacists, members of paid fire departments, chiefs and their first assistants of bona fide volunteer fire departments, and persons who are required to travel regularly and routinely in the course and scope of their employment;

(4) Persons who because of age, sickness or other physical infirmity would suffer serious detriment if required to serve as a juror; and

(5) Persons who have served as grand or petit jurors in criminal cases or as trial jurors in civil cases during a period of three years immediately preceding their selection for jury service.

Art. 404 – The jury commission of each parish shall consist of five members, each having the qualifications set forth in Article 401.

In Orleans Parish the jury commission shall be appointed by the governor, and the commissioners shall serve at his pleasure. In other parishes the jury commission shall consist of the clerk of court or a deputy clerk designated by him in writing to act in his stead in all matters affecting the jury commission, and four other persons appointed by written order of the district court, who shall serve at the court's pleasure.

Before entering upon their duties, members of the jury commission shall take an oath to discharge their duties faithfully.

Three members of the jury commission shall constitute a quorum.

Meetings of the jury commission shall be open to the public.

Art 408. – In parishes other than Orleans, the jury commission shall select impartially at least three hundred persons having the qualifications to serve as jurors, who shall constitute the general venire.

A list of the persons so selected shall be prepared and certified by the clerk of court as the general venire list and shall be kept as part of the records of the commission.

The name and address of each person on the list shall be written on a separate slip of paper which shall be placed in a box labeled "General Venire Box."

After the jury commission has *selected* the general venire, it shall lock and seal the general venire box and deliver it to the clerk of the court, as the custodian thereof.

The jury commission shall meet at least once every six months and when ordered by the court, and may meet at any time to select or supplement the general venire. The commission may select a new general venire at any meeting,

and shall do so when ordered by this court. Amended by Acts 1968, No. 140, § 1.[2]

Art. 410 – At each commission meeting to revise and supplement the general venire, the commission shall examine the general venire list prepared at the previous selection of the general venire, and shall delete therefrom the names of those persons who:

(1) Have served as civil or criminal jurors since the previous selection of the general venire; or

(2) Are known to have died or who have become disqualified to serve as jurors since their selection on the general venire.

The slips bearing the names of those persons deleted from the general venire list shall be removed from the general venire box.

The commission shall then supplement the list prepared at the previous commission meeting and the corresponding slips in the box by selecting a sufficient number of additional persons in compliance with Article 408 or 409, whichever is applicable.

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[2] Art. 408 – In parishes other than Orleans, the jury commission shall select impartially at least three hundred persons having the qualifications to serve as jurors, who shall constitute the general venire.

A list of the persons so selected shall be prepared and certified by the clerk of the court as the general venire list, and shall be kept as part of the records of the commission.

The name and address of each person on the list shall be written on a separate slip of paper, with no designation as to race or color, which shall be placed in a box labeled "General Venire Box."

After the jury commission has selected the general venire, it shall lock and seal the general venire box and deliver it to the clerk of court, as the custodian thereof.

The jury commission shall meet at least once every six months and when ordered by the court, and may meet at any time to select or supplement the general venire. The commission may select a new general venire at any meeting, and shall do so when ordered by the court.

Art. 411 – Upon order of the court the jury commission in parishes other than Orleans shall select by drawing indiscriminately and by lot from the general venire box the names of at least twenty but not more than fifty persons, with the number to be specified by the court in its order, who shall constitute the grand jury venire. A grand jury venire shall not be drawn from a general venire containing fewer than three hundred names.

The name of each person so selected shall be written on a slip of paper, with no designation as to race or color, in the presence of the commission, which shall place the slips in an envelope, seal the envelope, and write thereon the words "Grand Jury Venire."

The sealed envelope shall be placed in a box labeled "Grand Jury Box," which shall be locked and sealed and placed in the custody of the clerk of court for use at the next term of court, subject to the orders of the district court, as hereinafter provided. Amended by Acts 1968, No. 141, § 1.[3]

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[3]Art. 411 – Upon order of the court the jury commission in parishes other than Orleans shall select by drawing indiscriminately and by lot from the general venire box the names of at least twenty but not more than fifty persons, with the number to be specified by the court in its order, who shall constitute the grand jury venire. A grand jury ventre shall be not drawn from a general venire containing fewer than three hundred names.

The slips containing the names of the persons so drawn shall be placed in an envelope, which shall be sealed and the words "Grand Jury Venire" written thereon.

The sealed envelope shall be placed in a box labeled "Grand Jury Box," which shall be locked and sealed and placed in the custody of the clerk of court for use at the next term of court, subject to the orders of the district court, as hereinafter provided.

The clerk shall prepare subpoenas directed to the persons on the grand jury venire, ordering their appearance in court on the date set by the court for the selection of the grand jury, and shall deliver the subpoenas to the sheriff for service.

Art. 413 – The grand jury shall consist of twelve persons qualified to serve as jurors, selected or drawn from the grand jury venire.

In parishes other than Orleans, the court shall select one person from the grand jury venire to serve as foreman of the grand jury. The sheriff shall draw indiscriminately and by lot from the envelope containing the remaining names on the grand jury venire a sufficient number of names to complete the grand jury. The envelope containing the remaining names shall be replaced into the grand jury box for use in filling vacancies as provided in Article 415.

In the parish of Orleans, the court shall select twelve persons from the grand jury venire, who shall constitute the grand jury. The court shall thereupon select one of the jurors to serve as foreman.

Art. 414 – A grand jury shall be impaneled twice a year in each parish, except in the parish of Cameron, in which at least one grand jury shall be impaneled each year.

In parishes other than Orleans, the court shall fix the time at which a grand jury shall be impaneled, but no grand jury shall be impaneled for more than eight months, nor less than four months, except in the Parish of Cameron in which the grand jury may be impaneled for a year.

In Orleans Parish, a grand jury venire shall be drawn by the jury commission not earlier than the fifteenth nor later than the twentieth day of February and August of each year. On the next legal day following the drawing, the jury commission shall submit the grand jury venire to the presiding judge, who shall impanel the grand jury. A grand jury in Orleans Parish shall be impaneled on the first Wednesday of March and September of each year.

A grand jury shall remain in office until a succeeding grand jury is impaneled. A court may not discharge a grand jury or any of its members before the time for the impaneling of a new grand jury, except for legal cause.

Art. 415 – When a vacancy occurs on a grand jury, the court shall fill the vacancy as follows:

(1) In parishes other than Orleans, by ordering the sheriff to draw indiscriminately and by lot from the envelope containing the remaining names on the grand jury venire a sufficient number of names to complete the grand jury. If the names in the envelope be exhausted before the grand jury is completed, or if a vacancy occurs on the grand jury and no names remain in the envelope, the court shall order the jury commission to withdraw indiscriminately and by lot from the general venire box and additional number of names sufficient to complete the grand jury.

(2) In Orleans Parish, by ordering the jury commission to draw indiscriminately and by lot from the general venire box twelve or more names, as specified by the court, from which the court shall select the persons necessary to fill the vacancy.

(3) If the foreman of the grand jury is, for any reason, unable to act, the court shall designate some member of the grand jury to serve as acting foreman or to serve as a new foreman of that grand jury. An acting foreman has the powers and duties of the foreman.

Art. 416 – Upon order of court the jury commission in parishes other than Orleans shall draw a petit jury venire. The commission shall draw indiscriminately and by lot thirty name slips from the general venire box, unless directed by the court order to draw a larger number. The persons whose names are so drawn shall be subject to serve as petit jurors for the first week of the next criminal session of court.

The court may also order the commission to draw indiscriminately and by lot as many additional name slips, not less than thirty, as it may direct for each additional week that a petit jury venire may be required, not to exceed two additional weeks. The persons whose names are so drawn shall be subject to serve as petit jurors for the week for which their names were drawn.

A petit jury venire for the first week of a session shall not be drawn from a general venire containing less than two hundred fifty names, and no petit jury venire for any subsequent week shall be drawn from a general venire containing less than one hundred fifty names.

The commission shall place the slips bearing the names of the petit jury venire for each week in a separate envelope. It shall seal each envelope and write thereon the words "Petit Jury Venire No. 1," "Petit Jury Venire No. 2," and "Petit Jury Venire No. 3." Each envelope shall be placed in a box labeled "Petit Jury Box."

If a petit jury venire does not serve during the week for which it was drawn, the court may order that it serve during any other week of that session of court.

Art. 417. In parishes other than Orleans, the clerk of court shall make a proces verbal of the selection of the general venire and of the drawing of the grand jury venire and of the petit jury venire. It shall be certified to by a member of the commission and shall be filed in the clerk's office as a public record.

The clerk shall make a list of the names on the grand jury venire and on the petit jury venire, showing the week for which each petit jury venire is to serve. The lists, together with the general venire list, shall be a part of the proces verbal.

The clerk shall cause a copy of the petit jury venire list and grand jury venire list to be published in the official journal of the parish, if there be one, or in some other newspaper published in the parish, or, if there is no official journal or other newspaper in said parish, he shall post a copy of the lists on the door of the courthouse.

The clerk shall prepare subpoenas directed to the persons on the petit jury venire and deliver them to the sheriff for service.

Art. 419 – A general venire, grand jury venire, or petit jury venire shall not be set aside for any reaosn unless fraud has been practiced or some great wrong committed that would work irreparable injury to the defendant.

This article does not affect the right to challenge for cause a juror who is not qualified to serve.

**2. PORTION OF DECISION OF SUPREME COURT OF LOUISIANA IN *STATE OF LOUISIANA V. PRATT*, 255 La. 919, 233 So. 2d 883 (1970), DEALING WITH JURY SELECTION.**

HAMLIN, Justice.

By bill of indictment filed September 15, 1967, Lee Perry Pratt was jointly charged with Claude Alexander with the crime of aggravated rape upon a young woman on September 4, 1967—the record reveals that the victim was sixteen years of age at the time the alleged crime was committed. LSA-R.S. 14:42. A severance was granted on November 10, 1967, after the hearing of preliminary motions.[1] Defendant was tried by jury, found guilty without capital punishment, and sentenced to a term at hard labor in the Louisiana State Penitentiary for the remainder of his natural life. He appeals

[1] Minutes of the trial court, January 15, 1968, recite in part; "In accordance with the District Attorney's filing his new indictments and in view of the language of Code 705 stating that the proceedings under the original indictment are not affected except that it may be inconsistent with the indictment under the provisions of this code, in order to protect the rights of the accused, counsel for the accused moves that all of the proceedings under the original indictment, including but not limited to the motion for severance, application for Bill of Particulars, motion to quash and all proceedings in connection therewith, be made a part of the new indictment, and further, that the accused, James [Lee Perry] Pratt, reserves his rights as a pauper, as provided under the Code of Civil Procedure, to obtaining the transcript of the entire proceedings."

to this Court from his conviction and sentence, presenting for our consideration twelve bills of exceptions.[2]

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**Bill of Exceptions No. 2.**

Bill of Exceptions No. 2 was reserved when the trial court overruled defendant's motion to quash the indictment filed against him for the following reasons:

1. The Jury Commission which selected the Grand Jury list and venire excluded women and members of the Negro race.

2. The Grand Jury list and Venire from which the Grand Jury was empaneled and the Grand Jury which found the indictment excluded women.

3. Citizens of the Negro race were included in the Grand Jury list and Grand Jury venire in such small numbers as to constitute only a token, having no relationship to the number of citizens of the Negro race as compared to the number of citizens of the Caucasian race in the general population in the Parish of Lafayette and in the Fifteenth Judicial District of the State of Louisiana.

4. The indictment filed against Lee Perry Pratt is invalid and illegal and should be quashed because it was returned by a Grand Jury empaneled from a Grand Jury venire made up contrary to the provisions of the Fifth, Sixth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States.

Counsel for the defendant urges herein that Bill of Exceptions No. 2 contains three propositions, each of which is sufficient to quash the indictment: (1) There were no Negroes on the Jury Commission which selected the Grand Jury which indicted the defendant; (2) There were no

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[2]The appeal of Claude Alexander was also argued in this Court on the day we heard the instant appeal. Bills of exceptions reserved to the denial of preliminary motions are similar in both appeals.

Negroes on the Grand Jury which indicted the defendant; and (3) There were no women on the Jury Commission, Grand Jury, or Petit Jury.

Oliver J. LeBlanc, Clerk of Court, Lafayette Parish, Lafayette, Louisiana, testified that Members of the Jury Commission herein were of the Caucasian race; that there had never been any Negroes on the Commission. This Commission of five members, including the Clerk of Court, is appointed by the district judge, who makes his own selection or secures recommendations from the Clerk of Court. Mr. LeBlanc stated that he had never made any recommendations to the judge, and that he did not know whether the names of any Negroes had been submitted to the judge for appointment.

Despite the fact that the Jury Commission included no Negroes in its composition, the evidence discloses no prejudicial exclusion. Under the circumstances, we find that the following from *State v. Barksdale*, 247 La. 198, 170 So. 2d 374 (Cert. denied), 382 U.S. 921, 86 S.Ct. 297, 15 L.Ed. 2d 236, is controlling:

> "Another complaint is that no Negro has ever served as Jury Commissioner or as Foreman of the Grand Jury in Orleans Parish. These are appointive offices filled by the governor and judges, respectively, based upon their evaluation of the qualification of the individual appointee. The absence of Negroes in those offices at this time is not evidence of systematic discrimination against Negroes in the selection of juries." See, *State v. Marks*, 252 La. 277, 211 So. 2d 261.

The testimony attached to the instant bill discloses that the jury venire herein was selected from a cross-section of the Parish of Lafayette, and that names placed in the venire were chosen from various lists, such as the Telephone Directory, the City Directory, and the voting list of the Registrar of Voters. No conscious effort was made to include or exclude members of any race. Questionnaires were sent to

prospective jurors under a system of selecting one out of eight names. Answers included a designation of race, but the testimony affirms that race was not considered when names gathered from the questionnaires were placed in the jury venire box. Pertinent testimony of Mr. LeBlanc is as follows:

"Q. Was any conscious effort made to include members of the Negro race?

"A. We do not make selection from race. We just go to the questionnaries or by recommendations, one way or the other.

"Q. Now you said that list was put in the venir box. What list?

"A. The slips or list that are put in the general venire box are made from questionnaires that I mailed out.

"Q. Questionnaires?

"A. Yes.

"Q. That are mailed out to whom?

"A. To different people in the Parish.

"Q. And these questionnaires ask them to recommend—

"A. No, no, to fill in questionnaires to get their qualifications and occupations to see if they are qualified to serve on the jury.

"Q. Now, who is this questionnarie sent to? How is that determined?

"A. To the different people in the Parish by the registrar of voter's list and the telephone book, city directory, different lists that are submitted by school board or any list that we can find that we think we got address for the mixed race one way or the other.

"Q. In this instance here of this grand jury venire, the last one that we're talking about, was the list of registered voters from Mr. Eraste Landry's office used?

"A. It was.

"Q. Did that include the list of colored voters as well as white voters?

"A. It did.

"Q. Were any selections made from the list of colored voters?

"A. No selections were made from colored voters or white voters. They were taken if we thought that they were qualified to serve on the jury."

The fact that the Grand Jury included no members of the Negro race is, in our opinion, a matter of coincidence and not purposeful exclusion. As stated supra, the composition of the general venire was indiscriminate; the names of the Grand Jury venire were drawn from the general venire. It follows that race was not a factor in selection. See, Article 411, Louisiana Code of Criminal Procedure.

Article 402 of the Code of Criminal Procedure provides, "A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service." In *State v. Comeaux*, 252 La. 481, 211 So. 2d 620, we stated the reason for the exclusion of women from mandatory jury service as follows:

> "Nor can we conclude that the statute exempting women from jury service on the basis of their sex is not based upon a reasonable classification. Women by nature are the center of home and family life. Louisiana, acting in pursuit of the general welfare, may conclude that women may be relieved from the civic duty of jury service. *Hoyt v. State of Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed. 2d 118 (1961). See also *State v. Reese*, 250 La. 151, 194 So. 2d 729 (1967)."

In *Hoyt v. State of Florida, supra*, the United States Supreme Court considered a Florida statute similar to Article 402, *supra*. It held the statute constitutional and concluded:

"* * * Given the reasonableness of the classification involved in Sec. 40.01(1), the relative paucity of women jurors does not carry the constitutional consequence appellant would have it bear. 'Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period.' *Hernandez v. Texas, supra,* 347 U.S. 475, at 482, 74 S.Ct. 667, at 672, 98 L.Ed. 866."

We conclude that defendant herein suffered no deprivation of his constitutional rights by the omission of women from the Jury Commission, Grand Jury, and Petit Jury. No women volunteered for jury service; the following testimony of Mr. LeBlanc affirms this fact:

"Q. In drawing up the list of three hundred names, were any citizens of the female sex included?

"A. No.

"Q. In fact, all women were excluded, isn't that right?

"A. We didn't have any names submitted to us of any with the intention of willing to serve.

"* * *

"Q. Were any invitations or notices sent to women advising that they had a right to declare their desire to serve on the jury?

"A. I've discussed that with the Assistant District Attorney and I've sent her at different women's clubs to explain to the women the possibility of being on the jury. The reason so far that the women have not served is because facilities and accommodations for ladies were not available in the old courthouse. But since the new place is being constructed we're working on the women to submit names and intention to serve."

Defendant had the burden of proving unreasonable race and class discrimination under the assertions and contentions averred in this bill of exceptions. *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866. This he failed to

do; likewise, he proved no violation of his constitutional rights.

Bill of Exceptions No. 2 is without merit.

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